IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 300

BEN W. FORTSON, JR., ET AL., APPELLANTS,

vs.

HENRY J. TOOMBS, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MEMORANDUM

This supplemental memorandum is submitted in order to clarify the position of the appellees with respect to certain questions which arose during oral argument.

I.

The District Court Did Not Abuse its Discretion in Enjoining, Pending Fair Reapportionment, the Proposal of An Entirely New State Constitution By A Grossly Malapportioned Legislature.

Two points are now clear beyond any doubt. First, the Georgia House of Representatives is malapportioned by federal constitutional standards. Appellants concede that fact. Second, under the rationale of *Reynolds* v. *Sims* 377 U.S. 533, 84 Sup.Ct. 1362, 12 L.Ed. 2d 506 (1964), such malapportionment has the effect of denying to appellees and others similarly situated their constitutional rights under the Fourteenth Amendment. Under normal rules

of constitutional adjudication appellees would be entitled to immediate relief. Cf. *Ex parte Milligan*, 71 U.S.(4 Wall.)2, at 121, 18 L.Ed. 281 (1866).

In *Reynolds* v. *Sims*, as in the school segregation cases, this Court recognized that in some instances the shock of a grant of immediate relief to the plaintiffs in such cases would be so severe that a period of adjustment and transition must be allowed in the interest of orderly government. The length of this period of adjustment was left to the discretion of district courts on the assumption that they, being more familiar with local conditions, are in a better position than is this Court to make a wise and practical evaluation of the relevant circumstances and to mould their decrees in accord with traditional equitable principles in such manner that fair reapportionment may be achieved in an orderly, yet expeditious, manner.

In the present case, the district court recognized that, under its mandate from this Court in *Reynolds v. Sims*, it was authorized to employ the normal powers of a court of equity to protect the rights of the parties during the period of transition and to take such protection into account in determining the length of the period of adjustment. The district court therefore granted the State one and one-half years within which to bring about a fair reapportionment. It allowed this additional time on the assumption that such an "accommodation", including the injunction restraining the submission of a new constitution pending reapportionment, was within its equity powers.

Indeed, as *Reynolds* v. *Sims* makes clear, after a state legislature has been judicially determined to be invalidly apportioned, the federal constitutional rights of the appellees and other under-represented citizens to full and

equal participation in the political processes are violated by the continued functioning of the defectively constituted legislature. Thus, after the order of June 19, 1964, all activity of the General Assembly, including the passage of legislation and the proposal of the new constitution, violated the constitutional rights of the appellees. However, the district court recognized that the interest of orderly government during the interim prior to reapportionment required that the General Assembly be permitted to function even at the expense of the rights of the appellees. Only one limitation upon its powers was imposed — that the General Assembly should not, so long as the appellees are not fairly represented therein, draft and submit to the people an entirely new charter of state government which would not be subject to modification after reapportionment except by a two-thirds vote of both houses of the legislature.

During the oral argument before this Court on November 19, 1964, Mr. Justice Stewart inquired whether the submission of a new constitution to the voters by a malapportioned legislature constituted a violation of the federal constitutional rights of the under-represented voters. For the reason just given, in the framework of the present case, the answer is necessarily "yes". Since June 19, 1964 all of the activities of the Georgia General Assembly have violated such rights of appellees and such violations will continue until a proper reapportionment has been achieved.

However, nothing in the order of the district court purports to require that constitutional amendments be proposed only by a representative legislative body apportioned in accordance with the decision of this Court in *Reynolds* v. *Sims*. The proposal of constitutional amend-

ments by 3% of the people, as suggested by Mr. Justice Stewart during the oral argument, is not inconsistent with the injunctive relief granted by the district court. The present case does not involve the proposal of a new constitution by a minority of the electorate, as is possible in states enjoying broad initiative measures. In those states citizens may, if dissatisfied with constitutional proposals submitted by their legislatures, present alternative proposals or initiate new ones for the consideration of the electorate. Other citizens are free to make counter proposals, thus giving the electorate a fair choice between competing views. In contrast to minority legislative rule, such initiative measures make state governments more, rather than less, responsive to the will of the people. Thus, it is clear that the proposal of a constitutional amendment by a minority of the electorate is not, *per se*, invalid. It is only where, as in Georgia, the power to initiate all such proposals is limited to a court-declared malapportioned legislature, that it becomes invalid.

In Georgia, there exists no procedure for the proposal of constitutional amendments by the electorate. Under the Georgia Constitution of 1945, all proposals for amendments to the constitution must originate with the grossly malapportioned General Assembly. Ga. Const. 1945, Art. XIII, Section I, Para. 1 (Ga. Code Ann. § 2-8101). And a constitutional convention cannot be convened without the concurrence of two-thirds of the membership of the General Assembly. Ga. Const. 1945, Art. XIII, Section I, Para. 2, Ga. Code Ann. § 2-8102. All constitutional proposals must, therefore, pass through the knothole of the grossly malapportioned House of Representatives prior to submission to the people. For these reasons the hypo-

thetical situation posed by Mr. Justice Stewart is not involved in this case.

The sole question on this appeal is whether the district court, in determining the period of transition, can employ its traditional equitable powers to mitigate in some degree the continued deprivation of the constitutional rights of appellees.

Appellants contend that the power of the district court is limited to the determination of the length of the period of transition and that the court can take no action whatever for the protection of appellees or to mitigate their circumstances during such period.

It is apparent that the extent to which appellees are affected by the continued deprivation of their constitutional rights during the period of adjustment is a matter of degree. Some of the activities of the malapportioned legislature during such period may be relatively harmless to appellees and others may be highly oppressive. However, no action by a malapportioned General Assembly is more pernicious to the rights of the appellees than the proposal of an entirely new state constitution which cannot be changed, after reapportionment, without the concurrence of two-thirds of the membership of both houses of the General Assembly. It is apparent that the district court necessarily took these factors into account in framing its decree.

For these and the other reasons set out in appellees' previous briefs, the district court should not be hamstrung in carrying out the mandate of this Court in reapportionment cases.

II.

MOOTNESS

Since The Proposal of A New Constitution By The 1965 General Assembly Is Highly Speculative and Problematical, The Injunction With Respect Thereto Is Moot.

It was conceded by counsel for the appellants on oral argument that the proposed constitution drafted by the General Assembly for submission at the November 3, 1964, general election (Ga. Laws, May-June 1964 Extraordinary Session 234) is now dead. Any question as to the propriety of that portion of paragraph 2 of the order of June 30, 1964, which prohibited its submission at the November 3, 1964 general election is clearly moot. The only other question presented by the appeal is whether the remaining language of paragraph 2 of the order which prohibited a proposed new constitution from being placed on the ballot at "any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards . . . ." (R. 200) is now moot.

In order that their position may not be misunderstood, the appellees desire to make it emphatically clear that they do not intend to waive or renounce their rights to such relief. Indeed, should the 1965 General Assembly again attempt to propose a new constitution prior to the time that it is reapportioned, the appellees would fully expect to apply to the district court to restrain its submission. While it is possible, as an abstract matter, that the same draft may again be proposed by the 1965 General Assembly, this certainly appears to be highly unlikely. Since 20 new members of the 54-seat Senate and 67 new members of the 205-seat House of Representa-

tives were elected in November, 1964 and did not participate in the preparation of the 1964 draft, it is certain as practical matter that, if any new constitution is to be proposed by the 1965 General Assembly, it must be hammered out as a new document. Indeed, it is completely speculative whether any such proposal will be made by the newly elected General Assembly. Under the standards established by this Court, it is clear that the case is now moot. See *e.g. Poe* v. *Ullman*, 367 U.S. 497, 81 Sup.Ct. 1752, 6 L.Ed. 2d 989 (1961); *Local No. 8-6, Oil Chemical and Atomic Workers International Union* v. *Missouri*, 361 U.S. 363, 80 Sup.Ct. 391, 4 L.Ed. 2d 373 (1960); *Love* v. *Griffith*, 266 U.S. 32, 45 Sup.Ct. 12, 69 L.Ed. 157 (1924); *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 40 Sup.Ct. 448, 64 L.Ed. 808 (1920); *Mills* v. *Green*, 159 U.S. 651, 16 Sup.Ct. 132, 40 L.Ed. 293 (1895).

Because of the abstract and hypothetical nature of the controversy with respect to the possible proposal of an entirely new constitution by the 1965 General Assembly, the attorneys for appellees felt themselves obligated to bring this matter to the attention of the Court and to move for dismissal of the appeal on this ground.

In the event this Court should hold this appeal to be moot, paragraph 2 of the order of June 30, 1964, (R. 200) prohibiting the submission of a proposed constitution, should be vacated (*United States* v. *Munsingwear*, 340 U.S. 36, 71 Sup.Ct. 104, 95 L.Ed. 36 (1950)), without prejudice to the right of the appellees, or of any other qualified Georgia citizens, to apply for a similar injunction should the 1965 General Assembly attempt to propose a new constitution. The remaining portions of the order of June 30, 1964, as modified November 3, 1964, holding unconstitutional the present 3-2-1 apportion-

ment, and restricting the terms of legislators elected at the November 3, 1964 general election, from which no appeal has been taken, would, of course, not be affected thereby.

Respectfully submitted,

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PROOF OF SERVICE

I, Emmet J. Bondurant, II, attorney for appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of November, 1964, I served copies of the foregoing Motion on the appellants herein named, by mailing copies in a duly addressed envelope, with postage prepaid, to Eugene Cook, Attorney General, State of Georgia, State Law Building, Atlanta, Georgia, attorney of record for said appellants.

Emmet J. Bondurant, II